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IN THE
COURT OF APPEALS OF INDIANA

EDWARD HOFFMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0611-CR-1044
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0512-FB-26

October 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Edward Hoffman appeals his convictions for three counts of Sexual Misconduct with a Minor,[1] as class B felonies, one count of Sexual Misconduct with a Minor,[2] as a class C felony, one count of Attempted Sexual Misconduct with a Minor,[3] as a class B felony, and one count of Dissemination of Matter Harmful to Minors,[4] a class D felony. Hoffman also appeals his aggregate sentence of sixty years in prison. Upon appeal, he presents the following restated issues for review:

1. Did the trial court abuse its discretion in allowing the State to admit two exhibits into evidence?

2. Was the class C felony sexual misconduct with a minor count a factually lesser-included offense of the other sexual misconduct with a minor counts?

3. Is Hoffman's sentence inappropriate?

We affirm.

During February 2005, Hoffman returned from overseas to Gaston, Indiana, to be with his ailing mother. His mother was a close friend of Theresa Critzman's, stepmother of then thirteen-year-old T.C.[5] When Hoffman's mother died, he continued to live in her home, located about two blocks from T.C.'s home. He quickly developed a close relationship with the Critzman family and was with them almost daily. Hoffman was in

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[1] Ind. Code Ann. § 35-42-4-9(a)(1) (West 2004).

[2] I.C. § 35-42-4-9(b)(1).

[3] I.C. § 35-42-4-9(a)(1); Ind. Code Ann. § 35-41-5-1 (West 2004).

[4] Ind. Code Ann. § 35-49-3-3(a)(1) (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007).

[5] T.C. was born May 23, 1991.

the military and, after moving back, also became a volunteer fireman for the town. T.C.'s father and stepmother thought Hoffman was a good role model for their son, and T.C. looked up to Hoffman and trusted him. Hoffman tutored T.C. in math at the end of the 2005 school year. T.C.'s parents frequently allowed (and even encouraged) T.C. to spend time alone with Hoffman, as T.C. had been having disciplinary issues at school and was eventually expelled.

On one occasion in late spring or early summer of that year, soon after T.C. turned fourteen, Hoffman took T.C. and other children to the movies. T.C. then spent the night at Hoffman's home. After Hoffman's niece went to bed, he and T.C. retired to Hoffman's room and closed the door. They watched a movie on Hoffman's laptop computer. Later, Hoffman observed T.C. looking at pornography on the computer, so he (Hoffman) entered a search word that caused more pornographic images to appear on the screen. He then began to wrestle with T.C., which ultimately resulted in him rubbing his pelvis against T.C. and telling the child he was "horny." *Transcript* at 80. He then asked T.C. to remove his pants. When T.C. refused, Hoffman threatened to tell T.C.'s parents that he had been caught looking at pornography.

T.C. eventually complied with Hoffman's request. After rubbing baby oil on his and T.C.'s genitals, Hoffman attempted to insert his penis into T.C.'s anus. Unable to achieve penetration, Hoffman rubbed his naked pelvis against T.C. until Hoffman ejaculated on T.C.'s stomach.

Later that summer, Hoffman moved out of his deceased mother's home and paid T.C. to help him pack and unpack. On one occasion while helping, T.C. spent the night

at Hoffman's new home. While T.C. was using Hoffman's computer, Hoffman inserted a pornographic DVD into the computer for T.C. to watch. The DVD depicted a policeman engaging in sexual activity with another man. Hoffman told T.C., "you should learn from this." *Id*. at 87. Hoffman proceeded to disrobe, "g[e]t on top of" T.C., and rub his pelvis against T.C. *Id*. He then told T.C. that they should "take it to the shower." *Id*. While in the shower with T.C., Hoffman rubbed body wash on his and T.C.'s genital areas and again attempted anal intercourse. Unable to penetrate T.C., Hoffman performed oral sex on T.C. and inserted his finger into T.C.'s anus. After this episode, T.C. asked Hoffman to stop doing this, and Hoffman agreed.

On a later date, however, T.C. once again spent the day and night at Hoffman's home. During his visit, T.C. observed Hoffman looking at homosexual pornography involving a military theme. Thereafter, he purchased two pornographic movies for T.C. from a website. Later that night, Hoffman began rubbing his pelvis against T.C. After lubricating with baby oil, Hoffman then inserted his penis into T.C.'s anus. Hoffman, who was not wearing a condom, ejaculated into the fourteen-year-old child's anus.

At the end of summer, T.C. began attending the Youth Opportunity Center (the YOC), a school for expelled youth. Hoffman offered to drive T.C. to the YOC each day, and T.C.'s parents accepted. During the daily trips to school, Hoffman often spoke with T.C. about the offenses. He warned T.C. that if he told his counselor at the YOC what had happened, Hoffman would go to jail for a long period of time.

In mid-September, T.C. ran away from home and was sent to live at the YOC on a full-time basis after he was retrieved by police. Thereafter, Hoffman attempted to visit

T.C. at the YOC on one occasion and several times expressed to T.C.'s parents a desire to visit him. When T.C. learned that Hoffman planned to visit him over Thanksgiving with T.C.'s family, T.C. acted out. In December, T.C. finally told his counselor about the sexual encounters with Hoffman.

After T.C. spoke with an officer of the Delaware County Sheriff's Department (the DCSD), the DCSD searched Hoffman's home pursuant to a warrant on December 16, 2005. Police recovered, among other things, several pornographic DVDs, a laptop computer, and a bottle of baby oil.[6] On December 22, the State charged Hoffman with three counts of sexual misconduct with a minor as class B felonies (Counts 1, 2, and 3), attempted sexual misconduct with a minor as a class B felony (Count 4), sexual misconduct with a minor as a class C felony (Count 5), and dissemination of matter harmful to minors as a class D felony (Count 6).

Hoffman's two-day jury trial commenced on September 11, 2006. T.C. testified regarding the three separate episodes of sexual conduct, as set forth above. Further, the trial court admitted into evidence, over Hoffman's objection, three pornographic DVDs that were recovered from Hoffman's bedroom during the search.

During closing argument, the State clearly delineated each of the counts involving sexual contact between Hoffman and T.C. The State argued to the jury that Counts 4 and 5 occurred during the initial sexual encounter at Hoffman's deceased mother's home. Specifically, the State explained Count 4 had been proven by evidence that Hoffman

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[6] The baby oil was found on the nightstand by Hoffman's bed and it had a broken lid. The location and condition of the bottle of baby oil corresponded with T.C.'s testimony.

attempted to insert his penis into T.C.'s anus, and Count 5 had been proven by evidence that Hoffman rubbed his naked pelvis against T.C. until he ejaculated on the child's stomach. Counts 1 and 2 related to the subsequent encounter in the shower at Hoffman's new home. Count 1 involved the deviate sexual conduct of Hoffman inserting his finger into T.C.'s anus, and Count 2, which also involved deviate sexual conduct, resulted from Hoffman performing oral sex on T.C. Finally, Count 3 involved the third sexual encounter in which Hoffman anally penetrated T.C. with his penis.

The jury found Hoffman guilty as charged. At the sentencing hearing on November 1, 2006, the trial court noted, "I was here during the whole trial and observed the demeanor of the Defendant and he had the same, sullen look that he has right now. And I see no remorse whatsoever." *Id*. at 251. Further, in its subsequent sentencing order the trial court set forth the following aggravating and mitigating circumstances:

> Mitigating Circumstances:
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> 1. The defendant led a law-abiding life for a substantial period of time before commission of the crimes.
>
> 2. These are the defendant's first Felony convictions.
>
> Aggravating Circumstances:
>
> 1. There was a substantial degree of care and planning on the part of the defendant in the commission of the crimes.
>
> a) The defendant's role was that of a principal.
>
> b) The defendant carefully arranged several overnight occasions, designed to allow him to be alone with the victim for extended periods of time.
>
> 2. The Court finds that the facts of the crime are particularly heinous or disturbing due to the repeated and progressive nature of the occurrences over a significant time period.

3. The Court finds that the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.

4. The Court considers the crime to be particularly devastating to the victim, his family members, and/or relatives.

5. The Court finds that the defendant was in a position of trust, having care, temporary custody, or control of the victim of the offense.

6. The Court also considers that the Defendant was a member of the armed forces who was trained to protect, not molest, the citizens of the United States.

Appendix at 212-13. The court found that the aggravators outweighed the mitigators and sentenced Hoffman to thirteen years in prison for each of the four class B felony convictions (Counts 1-4), six years for the class C felony conviction (Count 5), and two years for the class D felony conviction (Count 6). The court further ordered the sentences for all six counts to be served consecutively because the offenses were "separate and distinct acts" and because of his "contact with the victim at [the YOC] and his attempts to have the victim remain silent." *Id*. at 212. Hoffman now appeals.

1.

Hoffman initially argues the trial court abused its discretion by admitting into evidence Exhibits 5 and 6, which were two pornographic DVDs found in his bedroom.[7] In this regard, he asserts that "there was no evidence introduced at trial to connect the exhibits to the defendant and the commission of any alleged crimes and thus to make the

[7] On appeal, Hoffman does not challenge the admission of the other pornographic DVD (Exhibit 7) into evidence, though he did object below. Thus, any error in the admission of Exhibits 5 and 6 would appear to be harmless.

exhibits relevant." *Appellant's Brief* at 10. Hoffman further asserts the mere fact the DVDs were found at his home is not enough to make the DVDs relevant.

The admission of evidence is a determination within the trial court's sound discretion. *Smith v. State*, 839 N.E.2d 780 (Ind. Ct. App. 2005). Thus, the trial court's decision concerning the admissibility of evidence will not be reversed on appeal absent an abuse of that discretion. *Id*. An abuse of discretion occurs when the trial court's decision is clearly erroneous and contrary to the logic and effect of the facts and circumstances before the court. *Id*.

Hoffman's challenge to the admission of the exhibits appears to be based on relevance and lack of foundation. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ind. Evidence Rule 401. Further, "real evidence is admissible where (1) a witness is able to testify that the exhibit is 'like' the item associated with the crime, and (2) there is a showing that the exhibit is connected to the defendant and the commission of the crime." *Evans v. State*, 643 N.E.2d 877, 881 (Ind. 1994).

In the instant case, the pornographic DVDs found in Hoffman's bedroom were clearly relevant in that he had been charged with dissemination of matter harmful to minors by his display of pornographic material to T.C. In fact, T.C. testified regarding several times when Hoffman played homosexual pornographic DVDs for him. Moreover, the evidence revealed that the particular DVDs entered into evidence were associated with the crime. Officer Nancy Marvin testified that T.C. had described to her

various scenes and/or titles of pornographic movies that Hoffman had shown to him. Officer Marvin further testified that she had viewed the DVDs in question and their content and/or titles were consistent with T.C.'s reports. Thus, the trial court did not abuse its discretion by admitting Exhibits 5 and 6 into evidence.

2.

Hoffman contends his conviction for Count 5, class C felony sexual misconduct with a minor, should be vacated. This is based on his bald assertion that Count 5 is a factually lesser-included offense of Counts 1 through 4. Though his argument in this regard is cursory and difficult to decipher, we will attempt to address it.

In Counts 1 through 4, Hoffman was charged and convicted of class B felony sexual misconduct with a minor (or attempt thereof) involving deviate sexual conduct. *See* I.C. § 35-42-4-9(a)(1). With respect to Count 5, he was charged and convicted of class C felony sexual misconduct with a minor involving fondling or touching. *See* I.C. § 35-42-4-9(b)(1). We initially observe that the acts supporting Counts 1 through 3 did not even occur on the same day as the episode that led to Counts 4 and 5. With respect to Counts 4 and 5, though the acts occurred during the same episode of sexual misconduct, each count was supported by distinct evidence as set forth in the State's closing argument. Count 4 involved Hoffman's attempt to insert his penis into T.C.'s anus. In contrast, the facts supporting Count 5 arose after his unsuccessful attempt at penetration when Hoffman proceeded to rub his naked pelvis against T.C. until Hoffman ejaculated on T.C.'s stomach. Each conviction was clearly supported by separate acts as shown by

unique evidentiary facts.[8] Therefore, we reject Hoffman's request to vacate his conviction for Count 5.

3.

Finally, Hoffman challenges his sentence as inappropriate in light of the nature of the offense and his character. He, however, never actually applies the standard applicable to our review for inappropriateness.

We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*. An appellant has the burden of persuading us that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073 (Ind. 2006).

Here, Hoffman has not begun to persuade us that his sentence has met the inappropriateness standard of review, as he does not address the nature of the offenses or his character. Thus, we find nothing in Hoffman's appellate argument to justify revising his sentence. Moreover, a proper consideration of the nature of the offenses and

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[8] We note that Hoffman directs us to *Downey v. State*, 726 N.E.2d 794 (Ind. Ct. App. 2000), *trans. denied*, in sole support of his assertion that Count 5 was a factually lesser-included offense of Counts 1 through 4. In that case we held: "While child molesting by fondling or touching is a lesser offense than child molesting by deviate sexual conduct in terms of sentencing, it is neither inherently nor factually *included* in the greater offense and is in fact an entirely separate offense." *Id.* at 799 (emphasis in original). Hoffman does not explain how *Downey* lends support to his "argument" and such is not clear from our reading of the case.

Hoffman's character does not compel the conclusion that his aggregate sixty-year sentence is inappropriate.

With respect to his character, we acknowledge that Hoffman did not have a prior criminal history and apparently had led a law-abiding life for a substantial period of time before commission of the instant crimes. This is a substantial mitigating circumstance. Further, of some mitigating weight, we note that he has served our country as a member of the armed forces for a number of years. *See Hayden v. State*, 830 N.E.2d 923, 930 (Ind. Ct. App. 2005) (while a "decorated career in the military" deserves some mitigating weight, "'an honorable military service record does not excuse a sex crime.'") (quoting *Bluck v. State*, 716 N.E.2d 507, 515 (Ind. Ct. App. 1999)), *trans. denied*. Finally, with respect to his character, we observe the trial court's finding that Hoffman displayed no remorse for his vile actions. *See Fredrick v. State*, 755 N.E.2d 1078, 1084 (Ind. 2001) ("lack of remorse may be available as an aggravating circumstance even where a defendant has pled not guilty"); *see also Gibson v. State*, 856 N.E.2d 142 (Ind. Ct. App. 2006) (remorse, or lack thereof, is best gauged by a trial judge who views a defendant's demeanor first hand).

Turning to the nature of the offenses, we find them particularly heinous and disturbing. Here, Hoffman preyed on an especially vulnerable, young boy after developing a close and trusting relationship with the boy's family. He established himself as a role model for the child and then carefully arranged several occasions designed to allow him to care for and be alone with T.C. for extended periods of time in which to groom and then sexually abuse the child. Without recounting all of the details

of the sexual abuse set out fully above, we observe that the abuse escalated over the summer and occurred on three separate occasions. After the second episode, T.C. expressly requested that the sexual conduct end. Though Hoffman agreed, he soon crafted another opportunity to take advantage of T.C. This time, he finally accomplished his goal of penetrating T.C.'s anus with his penis. He then ejaculated inside the child without wearing a condom. Thereafter, once T.C. began attending the YOC, Hoffman conceived a plan in which he could maintain contact with T.C. every weekday morning as he drove T.C. to school. This allowed him to engage in a consistent campaign to keep T.C. quiet about the events of the summer. In light of the nature of the offenses, including Hoffman's extensive planning and grooming of the victim, the repetitious nature of the abuse, and the psychological coercion of his victim, we believe there is a high likelihood he will reoffend if given the opportunity.

Neither the nature of the crimes Hoffman committed nor his character renders his sentence inappropriate. Therefore, we affirm the sixty-year sentence imposed by the trial court.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.